No. 85-1812

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

FRANCIS THOMAS DEUTSCH,
Petitioner/Defendant,

v.

STATE OF NEW MEXICO,
Plaintiff/Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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STATEMENT OF QUESTIONS PRESENTED

QUESTION I

WAS PETITIONER DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS BY THE STATE'S CONSCIOUS USE OF HIS ATTORNEYS' TESTIMONY BEFORE THE GRAND JURY WITHOUT GIVING PETITIONER OPPORTUNITY TO RAISE ATTORNEY/CLIENT PRIVILEGE?

QUESTION II

WAS PETITIONER DENIED HIS FOURTH AND FOURTEENTH AMENDMENT RIGHTS BY THE STATE'S CRIMINAL AND WARRANTLESS SEARCH OF HIS PERSONAL MAIL?

QUESTION III

WAS PETITIONER DENIED DUE PROCESS OF LAW BY LATE DISCOVERY OF CRITICAL IMPEACHING EVIDENCE AND THE TRIAL COURT'S REFUSAL TO GRANT HIM A TAINT HEARING AFTER HE MADE A STRONG SHOWING OF PERJURY AND CRIMINAL INTERCEPTION OF HIS MAIL BY THE STATE'S AGENT AND PRINCIPAL WITNESS?

QUESTION IV

DOES A TWELVE YEAR PRISON SENTENCE FOR A FIRST OFFENDER CONVICTED OF CRIMES WITHOUT VIOLENCE OR IDENTIFIED VICTIMS CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT?

QUESTION V

WAS PETITIONER DENIED DUE PROCESS OF LAW WHEN THE NEW MEXICO COURTS REVERSED SEVEN OF THE FIFTEEN COUNTS IN HIS CASE, YET LEFT HIS CONVICTION AND TWELVE YEAR PRISON SENTENCE INTACT?

QUESTION VI

HAVING HEARD UNREBUTTED EVIDENCE THAT THE STATE VIOLATED THE TERMS OF A PLEA AND DISPOSITION AGREEMENT, MAY THE STATE COURT CONSTITUTIONALLY REFUSE TO PERMIT PETITIONER TO WITHDRAW HIS GUILTY PLEA THEREUNDER?

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OPINIONS BELOW

The New Mexico Supreme Court's unreported memorandum opinion dated February 5, 1986, denying Petitioner's petition for certiorari to that court, is attached hereto as Appendix A.

The New Mexico Court of Appeals handed down a written opinion. A true copy of this opinion is attached hereto as Appendix B.

JURISDICTIONAL STATEMENT

This Court has discretion to grant certiorari jurisdiction under 28 U.S.C. § 1254(1) and, as is more fully set forth below, should exercise this discretion pursuant to Supreme Court Rule 17.1(c) because the decisions of the New Mexico courts below are in conflict with the decisions of this Court on important questions of federal law.

CONSTITUTIONAL PROVISIONS

THE CONSTITUTION OF THE UNITED STATES

AMENDMENT 4
Search and Arrest Warrants

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 5
Rights in Criminal Cases

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6
Rights to a Fair Trial

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT 8
Bail, Fines, and Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT 14
Civil Rights

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONCISE STATEMENT OF MATERIAL FACTS

INTRODUCTION

This petition seeks review of the New Mexico Supreme Court's refusal to overturn the decision of the New Mexico Court of Appeals in *State of New Mexico v. Francis Thomas Deutsch*, No. 8355, filed December 31, 1985. A copy of the opinion of the Court of Appeals is attached as Appendix B. A timely motion to reconsider the New Mexico Supreme Court Decision was denied on March 5, 1986. True copies of Petitioner's motion and the Court's decision are attached as Appendix C.

Facts in Cause Number CR-37206:

All charges against Petitioner arise out of his ownership of a New Mexico real estate mortgage brokering business commencing in the fall of 1982. At the time Petitioner purchased the business, it and its principals were already under criminal investigation. Petitioner cooperated with this investigation, permitting Attorney General's investigators free access to the books and records of the business.

By late summer 1983, Petitioner became suspicious that he himself was the target of a criminal investigation. Finally, in the last week of September, 1983, he was summoned to the Attorney General's office and told that a forty-five count indictment had been prepared charging him with fraud in connection with certain business practices inherited from those who previously operated the business. Petitioner was given two days to consider whether to face this indictment or agree to a plea and disposition. In that

period an agreement was reached and, on September 29, 1983, Petitioner entered a plea of guilty to Information Number CR-37206 charging one count of Conspiracy to Commit Fraud in Excess of $20,000 in violation of Section 30-16-6 and 30-28-2(B), NMSA 1978, as amended, a third degree felony. A signed memorandum of the terms of this agreement was accepted and sealed by New Mexico District Judge Patricia Madrid on the same date. Subsequently, Judge Madrid recused herself from the case and District Judge Philip R. Ashby was assigned to continue the matter. A true copy of the Plea and Disposition Agreement is annexed hereto as Appendix D.

On November 1, 1984, on Petitioner's motion, a hearing was held before New Mexico District Judge Philip Ashby concerning the State's intentional prevention of Petitioner's performance of the terms of the Plea and Disposition Agreement. At this hearing Petitioner requested a finding that the State, not he, had violated the agreement, causing investor losses by, among other things, defaming Petitioner and refusing to permit potential salvage lenders to have access to company records controlled by the State. At that time, Petitioner did not seek to withdraw his plea. Rather, he requested that the court accept the agreement's principal provision from Petitioner's perspective, to wit, that Petitioner be granted either a deferred or suspended sentence in Information No. 37206. The State cross-examined Petitioner and his two other witnesses at this hearing, but offered no evidence.

Judge Ashby made no ruling at the conclusion of the November 1st hearing. However, on the State's recommendation, the court thereafter sentenced Petitioner to three years imprisonment in Information 37206. In response to Petitioner's motion to reconsider this sentence, Judge Ashby specifically denied Petitioner's motion to enforce the written agreement in plea and disposition. Petitioner later moved the court to permit him to withdraw his plea of guilty in this case and his motion too was denied. Petitioner seeks to withdraw his plea of guilty to Information Number 37206 or, alternatively, to enforce the written agreement's sentencing

provision. True copies of Petitioner's motions and the Court's orders relating to his sentences are annexed hereto as Appendix E.

Facts in Cause Number 37738:

Simultaneous with the criminal investigation in Cause Number CR-37206, Petitioner became involved in civil litigation instituted by Andrew Swarthout, Director of the New Mexico Division of Financial Institutions (DFI), against Guaranteed Equities, Petitioner's wholly owned company. This litigation was settled by the appointment of Harold Douglass, a DFI employee, as trustee of Guaranteed. Directly at issue below and in this petition is the lawfulness of Douglass' intercepting, opening and sharing with criminal investigators of personal mail addressed to Petitioner and others at Guaranteed.

The fact that Douglass intercepted and opened Petitioner's mail, including attorney/client mail wholly unrelated to Doublass' trusteeship, was objected to by Petitioner from the outset of Douglass' trusteeship. Mid-trial, in discovery, the tardiness of which was also in issue, Petitioner's counsel first obtained disinterested corroboration of this claim and further discovered evidence that Douglass was the "confidential informant" who had provided information to criminal investigators sifting through Petitioner's affairs. At trial, Douglass resolutely denied opening any mail, but this claim was refuted by three other witnesses, including one called by the State. An immediate, mid-trial, motion was made for a taint hearing. Petitioner's counsel made an offer of proof that Douglass had committed criminal violation of several federal statutes relating to interference with the mails, transmitted the fruit of this crime to Attorney General's Investigators preparing the case against Petitioner, and committed perjury in his trial testimony. The District Court refused to grant a hearing.

On the second day of trial a dispute arose between counsel for Petitioner and counsel for the State concerning the timeliness of the discovery of fourteen tape recordings containing conversations surreptitiously recorded between government investigators and Petitioner and others. Counsel for Petitioner alleged misconduct and prejudicial delay in that the existence of the tapes was not disclosed until the eve of trial and in that the tapes were not made available until the trial was well under way. Counsel for the State disputed these facts, but objected to a hearing to establish a basis upon which the court could rule. The District Court refused to conduct a hearing on the disputed facts. The tapes, received and reviewed by defense counsel after three days of trial, provided direct evidence corroborating Petitioner's claim that Harold Douglass and other government agents had criminally intercepted Petitioner's personal mail without warrant or probable cause and made use of the fruits of this search in the course of the investigation leading to Indictment CR-37738. This issue too was focused by timely motions mid-trial and by formal post-trial motions brought by Petitioner. These motions were denied. A true copy of this post-trial motion and supporting papers are annexed hereto as Appendix F.

During the course of the investigation leading to Indictment CR-37738, the grand jury heard testimony of, among others, Richard J. Grodner and Eric Prelo, attorneys who represented Petitioner and Guaranteed Equities, Petitioner's company. Neither attorney raised the attorney/client privilege, nor did they notify Petitioner of the grand jury investigation into his affairs. Petitioner first learned that his attorneys testified against him after the indictment was returned and he had been arrested under a warrant issued pursuant to it. At no time prior to his arrest was Petitioner aware that his attorneys had been compromised by State's investigators. Accordingly, Petitioner had no timely opportunity to claim attorney/client privilege, or to seek judicial intervention to prevent this egregious violation of the ethical obligation of his and the State's attorneys.

At trial, the court permitted attorneys Prelo and Grodner to testify to conversations allegedly in furtherance of a never specified crime or crimes charged in the indictment. The only crime which by its terms related to Petitioner's attorneys (Count 16 of Indictment CR 37738) charged Petitioner with solicitation of Grodner to commit an unspecified felony. No facts supporting this charge were proved and this count was dismissed by the District Court at the conclusion of the State's case in chief. Notwithstanding repeated motions objecting to Prelo and Grodner's testimony, the District Court permitted the indictment to stand and Grodner and Prelo's testimony to be considered as part of the State's evidence. A true copy of the written motion addressed to this issue is annexed hereto as Appendix G.

David King, another attorney representing Petitioner, was also called by the State to testify at trial, over objection, as to conversations he had with Petitioner. King refused to testify until directly ordered to do so by the court. Thereafter, King related the substance of two conversations with Petitioner and authenticated a transcription of a tape recording of the second of the two conversations. Although the conversations indicated that Petitioner was not at all a participant in the crimes charged in Indictment CR 37738, the State was permitted to argue that Petitioner's statements, made in supposed confidence to his own lawyer, were false exculpatory statements made in furtherance of an effort to disguise his allegedly criminal misconduct.

Madeline Gooch, an examiner of questioned documents called by the State, proved unable to testify with certainty that any of the so called forgeries alleged in Indictment CR 37738 were committed by Petitioner. Faced with a total failure of proof, the State was permitted, over objection, to elicit Gooch's expert opinion that the control handwriting samples voluntarily provided by Petitioner demonstrated an effort by him to disguise his true handwriting. This opinion was offered notwithstanding the fact that Miss Gooch had not been present when the exemplars were provided. The State argued that, although Petitioner was not the actual

forger of the checks in question, he had aided and abetted unidentified others in "forging" his own name to instruments payable to him. In thi. light, Gooch's testimony was irrelevant on the forgery counts for which she was called to testify.

A somewhat different basis for admitting Gooch's testimony was advanced at the conclusion of the trial and in the New Mexico Court of Appeals. Here, it was argued that Petitioner had disguised his handwriting, not in an effort to prevent his identification as the author of the questioned signatures, but as a kind of admission by misconduct of sinister involvement with the questioned checks. Petitioner was a "bad man," attempting to impede and delay Gooch's efforts to ferret out his unknown accomplice in forging his own signature upon the questioned documents. Gooch's testimony, the State's arguments from it, and the District Court's related jury instruction were all vigorously opposed by Petitioner as legally unsound, misleading and prejudicially confusing to the jury. The New Mexico Court of Appeals dismissed seven of the eight forgery counts holding that it was improper to charge Petitioner with forging his own name, but permitted Petitioner's conviction on the other eight counts to stand, even though evidence which the state had argued was the most important part of its case had been admitted in error. At issue in this petition is the competence, materiality and relevance of Miss Gooch's testimony as well as the prejudice to Petitioner in permitting the jury to hear this and other evidence relating to the now reversed "forgery" counts of Indictment CR 37738.

Defendant was convicted after twelve days of trial on fifteen of the seventeen counts charged in Indictment CR 37738. Count Seventeen (Racketeering) was dismissed by *nolle prosequi* on the first day of trial. Count Sixteen (Solicitation of Grodner) was dismissed at the conclusion of the State's case.

On January 30, 1985 the District Court sentenced Petitioner to nine years imprisonment on his conviction in Cause Number CR 37738, sentence to run consecutively with a three year sentence

imposed in spite of the terms of his negotiated guilty plea in Cause Number CR 37206. Petitioner is a married man living with and supporting his wife and two pre-school age daughters. He has no prior convictions. On February 6, 1985, the District Court denied Petitioner's motion to reconsider the severity of these sentences.

A timely appeal was filed by Petitioner. On December 31, 1985, the Court of Appeals handed down an opinion reversing Petitioner's conviction on seven of the eight counts of forgery in Cause No. CR 37738 (those counts based upon alleged "forgery" of his own name to instruments payable to him), but affirming Petitioner's conviction and sentences in all other respects. Petitioner's constitutional claims, strenuously raised at trial and urged on appeal, were ignored in this opinion. Petitioner made a timely petition for certiorari to the New Mexico Supreme Court, but was denied certiorari without opinion. Petitioner made a timely motion for rehearing in the New Mexico Supreme Court, but this request was denied. The New Mexico Petition for Certiorari is annexed hereto as Appendix H. The petition to the New Mexico Supreme Court raised issues nearly identical to those now before this Court.

REASONS FOR ALLOWING WRIT OF CERTIORARI

Certiorari is appropriate in this case because, if the convictions below are not overturned, a grave miscarriage of justice will result. Petitioner resolutely denies any factual truth to the allegations contained in Indictment CR 37738. He is an innocent man, convicted by inference and innuendo drawn from impermissible evidence. The New Mexico courts' decisions raise substantial issues concerning due process of law, search and seizure, and right to counsel under the United States Constitution. Additionally, this case presents constitutional issues concerning: 1. the consequences of the state's interference with performance under a plea bargain; 2. prejudice to the accused when improper charges are reversed on appeal without setting aside related charges heard by

the same jury; and 3. cruel and unusual punishment in light of the draconian sentence imposed by the New Mexico court.

The New Mexico Courts' decisions are inconsistent with opinions of this Court in *Brady v. Maryland*, 373 U.S. 83 (1963); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *In re Winship*, 397 U.S. 358 (1970); *Jackson v. Denno*, 378 U.S. 368 (1964); *Jackson v. Virginia*, 443 U.S. 307 (1978); *Maine v. Moulton*, 474 U.S. __, 106 S.Ct. 477 (1985); *Messiah v. United States*, 377 U.S. 201 (1964); *Mooney v. Holohan*, 294 U.S. 103 (1935); *Nardone v. United States*, 308 U.S. 338 (1939); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Rochin v. California*, 342 U.S. 165 (1952); *Santobello v. New York*, 404 U.S. 257 (1971); *Spano v. New York*, 360 U.S. 315 (1959); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Henry*, 447 U.S. 264 (1980); and *Weatherford v. Bursey*, 429 U.S. 545 (1977).

SUMMARY OF PETITIONER'S ARGUMENT

EFFECTIVE ASSISTANCE OF COUNSEL: The State's solicitation of testimony before the grand jury by attorneys Grodner and Prelo was a conscious abridgement of Petitioner's right to attorney/client confidentiality, an essential incident of the constitutional right to effective assistance of counsel.

SEARCH AND SEIZURE: Douglass' warrantless interception of Petitioner's personal mail and sharing of its contents with other government agents denied Petitioner's constitutional right to be free from unreasonable search and seizure.

DUE PROCESS: Petitioner's right to due process of law was violated on no fewer than six occasions: 1. when State's lawyers improperly induced Petitioner's lawyers to ignore their duty to raise attorney/client privilege on his behalf; 2. when Petitioner's attorneys improperly testified in the grand jury without giving Petitioner timely notice and opportunity to contest their improper

behavior; 3. when Harold Douglass criminally intercepted and opened Petitioner's mail; 4. when Harold Douglass committed perjury in response to questions concerning his criminal misconduct; 5. when the State's attorneys delayed discovery of critical defense evidence until the trial was well underway; and 6. when the trial court repeatedly denied evidentiary hearings on all the foregoing issues in the face of clear and explicit offers of proof by Petitioner.

PREJUDICIAL AND INSUFFICIENT EVIDENCE: Having dismissed seven of the fifteen counts against Petitioner, the New Mexico Court of Appeals should have found the remaining admissible evidence insufficient as a matter of law and reversed on all counts. At a minimum, Petitioner is entitled to a new trial, untainted by the irrelevant and prejudicial evidence relating to the legally untenable claim that Petitioner "forged" or aided and abetted the "forgery" of his own name.

CRUEL AND UNUSUAL PUNISHMENT: The sentence imposed should be vacated as a matter of constitutional law because on its face it is grossly disproportionate to the circumstances disclosed in the record. A twelve year prison sentence for a first offender convicted of non-violent crimes without identified victims is, on its face, cruel and unusual. This Court must exercise its inherent power to undo such a manifest miscarriage of justice.

PLEA BARGAIN AND SENTENCE: Petitioner's unrebutted evidence is that the State, not Petitioner, broke the plea bargain contract. The District Court should not have sentenced him to prison. Even granting that the plea bargain agreement failed, the New Mexico District Court should have withdrawn the plea and permitted Petitioner to contest the State on the merits of the matter.

PUBLIC INTEREST: There is substantial public interest at stake in this petition because the decisions below confirm a grave

miscarriage of justice, ignoring fundamental rights of the criminal accused in several critical areas of federal constitutional law.

PRAYER FOR RELIEF

WHEREFORE, Petitioner requests that this Court vacate his conviction and sentence in both causes, dismissing Indictment CR 37738 and permitting petitioner to withdraw his guilty plea in Criminal Information No. CR 37206.

Dated: May 1, 1986

Respectfully submitted,

JOHN J. KELLEHER

John J. Kelleher

University of San Diego
School of Law

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 1986, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to:

Paul Bardacke
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504
(505) 827-6081

Attorney for Respondent

There is no other party required to be served.

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May 1, 1986

AFFIDAVIT OF FILING

I, John J. Kelleher, declare:

I am a member of the bar of this court.

The foregoing PETITION FOR WRIT OF CERTIORARI, dated May 1, 1986, was timely filed on May 1, 1986, by a true copy thereof being deposited by me in the United States mail in San Diego, California, on May 1, 1986, enclosed in a sealed envelope with first class postage thereon prepaid, properly addressed to the United States Supreme Court.

Dated this 1st day of May, 1986, at San Diego, California.

JOHN J. KELLEHER
John J. Kelleher

State of California)
County of San Diego)

Subscribed and Sworn to before me this 1st day of May, 1986.

Notary Public